Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

October 20, 1998

Ms. Sharon Alexander
Attorney
Office of the General Counsel
Texas Department of Health
1100 West 49th Street
Austin, Texas 78756-3199

OR98-2458

Dear Ms. Alexander:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 118788.

The Texas Department of Health (the "department") received a request for copies of documents relating to the department's RFP No. HCF-96-05, to include the following: the proposal of Birch & Davis Health Management Corporation ("BDHMC"), the evaluation materials used to score the proposals, and materials relating to the RFP prepared for the department by the Lewin Group. You state that the department does not take a position on the release of these documents, and you raise section 552.305 of the Government Code on behalf of BDHMC and the Lewin Group.

Since the proprietary interests of BDHMC and the Lewin Group may be implicated by the release of the requested information, we notified them about the request for information. Both companies responded with arguments against the disclosure of material they provided to the department.

BDHMC contends that significant portions of its bid proposal and supporting documentation are excepted from disclosure under sections 552.102 and 552.110 of the Government Code. BDHMC's bid proposal includes the resumes of several of its employees. BDHMC contends that these resumes are excepted from disclosure pursuant to section 552.102 of the Government Code. Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Section 552.102 excepts information in personnel files only if it meets the test articulated under section 552.101 of the Government

Code for common-law invasion of privacy.[1] *Hubert v. Harte-Hanks Tex. Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.).

For information to be protected from disclosure by the common-law right of privacy the information must be highly intimate or embarrassing such that its release would be highly objectionable to a reasonable person, and the information must not be of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The Texas Supreme Court found the following types of information to be highly intimate and embarrassing: information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. We do not find the professional qualifications of BDHMC employees to be highly intimate and embarrassing information. *See* Open Records Decision No. 455 (1987) (qualifications of applicants for employment not protected by common-law right to privacy). Thus, we conclude that section 552.102 does not except from disclosure the employee resumes included in the bid proposal or narrative descriptions of the employees' expertise.

Next, we consider whether BDHMC's bid proposal is excepted from disclosure under section 552.110 of the Government Code. Section 552.110 protects the property interests of private parties by excepting from disclosure two types of information: (1) trade secrets, and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision.

The Texas Supreme Court has adopted the definition of "trade secret" from the Restatement of Torts, section 757, which holds a "trade secret" to be

> any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to a single or ephemeral event in the conduct of the business . . . . A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

[1]Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors. RESTATEMENT OF TORTS § 757 cmt. b (1939).[2] We have held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990).

BDHMC contends that much of its bid proposal is a protected trade secret. BDHMC submitted a list of 41 sections of its bid proposal that it considers to be trade secrets. Having reviewed BDHMC's bid proposal, we found that many of these 41 sections do not appear to come within the Restatement's definition of a trade secret.[3] Information is not a trade secret if it relates exclusively to a particular circumstance, that is, "a single or ephemeral event in the conduct of the business" rather than "a process or device for continuous use in the operation of the business." RESTATEMENT OF TORTS § 757 cmt. b (1939); *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958); Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982). Much of the information that BDHMC claims is a trade secret appears to relate exclusively to its contract with the department.

We did find the sections of BDHMC's bid proposal listed below, or portions thereof, to come within the Restatement's definition of trade secret. Please note that these sections are identified by the numbers (1-41) assigned to them by BDHMC in pages 2-6 of its September 15 letter to this office:

> 6, 9, 10, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 26, 28, 30, 38, 40, 41, 42, and 43.

---

[2]The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

> (1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

[3]Please note that we were unable to locate the document described in item 34 of BDHMC's trade secret list.

Additionally, we conclude that BDHMC has established a *prima facie* case for withholding all or portions of these sections under the trade secret prong of section 552.110. We have marked these sections accordingly (see yellow tabs in black binders). The department must withhold the marked information from disclosure.

BDHMC also contends that significant portions of its bid proposal are excepted from disclosure under the second prong of section 552.110 as commercial or financial information. In Open Records Decision No. 639 (1996), this office announced that it would follow the federal courts' interpretation of exemption 4 to the federal Freedom of Information Act when applying the second prong of section 552.110 for commercial and financial information. In *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), the court concluded that for information to be excepted under exemption 4 to the Freedom of Information Act, disclosure of the requested information must be likely either to (1) impair the Government's ability to obtain necessary information in the future, or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974).[4] A business enterprise cannot succeed in a *National Parks* claim by a mere conclusory assertion of a possibility of commercial harm. ORD 639 at 4 (1996).

To prove substantial competitive harm, the party seeking to prevent disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure. *Id.* Having reviewed BDHMC's arguments against the disclosure of commercial and financial information, we find the arguments to be conclusory and insufficient to satisfy the *National Parks* standard. *See* Open Records Decision No. 494 (1988) (balancing public interest in disclosure of information with competitive injury to company). *See generally* Freedom of Information Act Guide & Privacy Act Overview (1995) 136-138 (disclosure of prices is cost of doing business with government), 145-147, n. 200 (competitive harm prong denied when prospect of injury too remote or when information is too general in nature).

In *Critical Mass Energy Project v. Nuclear Regulatory Commission*, the court limited the holding in *National Parks* to information that is required to be submitted to the government. *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 872 (D.C. Cir. 1992), *cert. denied*, 507 U.S. 984 (1993). For information that is voluntarily

[4]Neither the department nor BDHMC specifically argues that releasing the BDHMC bid proposal would impair the department's ability to obtain similar information in the future. We do not believe that the department's ability to obtain similar information in the future will be impaired by publicly disclosing BDHMC's bid proposal, because it is unlikely that companies will stop competing for government contracts if certain information involved in those competitions is disclosed. *See Racal-Milgo Gov't Sys. v. SBA*, 559 F. Supp. 4 (D.D.C. 1981). In other words, the benefits associated with the submission of this particular type of information make it unlikely that the department's ability to obtain future submissions will be impaired.

submitted to the government, the court announced a new test for withholding information from disclosure: the information must be of a kind that the provider would not customarily make available to the public. *Id.*

BDHMC argues that it voluntarily submitted its bid proposal and related correspondence to the department, and that we should, therefore, consider the release of its bid proposal under the *Critical Mass* standard. We disagree. Courts have concluded that information is produced to the government voluntarily when it was not produced pursuant to subpoena or to obtain a contract or other benefit from a governmental body. *McDonnell Douglas Corp. v. United States Equal Employment Opportunity Comm'n*, 922 F. Supp. 235, 241-42 (D. Mo. 1996) (documents produced pursuant to agreement and not to subpoena were produced voluntarily); *Cortez III Serv. Corp. v. National Aeronautics & Space Admin.*, 921 F. Supp. 8, 12-13 (D.D.C. 1996) (general and administrative expense rate ceilings not required to be submitted as part of proposal were submitted voluntarily); *McDonnell Douglas Corp. v. National Aeronautics & Space Admin.*, 895 F. Supp. 316, 318 (D.D.C. 1995) (price elements necessary to win a government contract are not voluntary); *Chemical Waste Management, Inc. v. O'Leary*, Civ. A. No. 94-2230 (NHJ), 1995 WL 115894 (D.D.C. Feb. 28, 1995) (price information submitted in response to a requirement in a request for proposals not voluntarily submitted); *Lykes Bros. Steamship Co. v. Pena*, Civ. A. No. 92-2780-TFH, 1993 WL 786964 (D.D.C. Sept. 2, 1993) (documents provided as a requirement to obtain government approval of application not voluntarily produced). Because BDHMC submitted the information at issue to the department in order to obtain a contract, we find that BDHMC did not voluntarily submit this information to the department. Thus, the *Critical Mass* standard is not applicable in this case.

Because BDHMC has not satisfied the *National Parks* standard and the *Critical Mass* standard does not apply here, we conclude that none of the information characterized as commercial or financial information in BDHMC's September 15 and September 21 letters to this office may be withheld from disclosure under section 552.110 (see lists of commercial and financial information on pp. 8-15 of BDHMC's September 15 letter and pp. 1-2 of its September 21 letter). Thus, the department should withhold the trade secrets marked with yellow tabs and should publicly disclose all other sections of BDHMC's bid proposal.

Finally, we consider the issues raised by the Lewin Group. The Lewin Group states that it does not object to the release of a document entitled "Managing Integration Problems Between Fee-For-Service & Managed Care" and will defer to the department's judgment on the release of this document. The department has not objected to the release of this document, and therefore, we conclude that this document must be released to the requestor.

The Lewin Group contends that a group of documents it calls "the interview notes" are excepted from disclosure under section 552.110 of the Government Code. Section 552.301(b)(3) requires a governmental body to submit copies of the documents at issue to this office. However, the department failed to provide us with copies of the interview notes.

Thus, we are unable to determine whether the interview notes are excepted from disclosure under section 552.110 as the Lewin Group contends. In the absence of a demonstration that there is a compelling reason for withholding the interview notes, the department must publicly disclose the interview notes. *See* Gov't Code §§ 552.302, .303(e).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

Karen Hattaway

Karen E. Hattaway
Assistant Attorney General
Open Records Division

KEH/ch

Ref: ID# 118788

Enclosures: Marked documents, copies of briefs

cc: Mr. Marc T. Shivers
Hughes & Luce, L.L.P.
111 Congress Avenue, Suite 900
Austin, Texas 78701
(w/o enclosures)

Ms. Debra L. Glickfeld
Staff Attorney
Birch & Davis Health Management Corporation
8905 Fairview Road
Silver Spring, Maryland 20910
(w/o enclosures)

Mr. Walter H. Messick
Taylor, Messick & Tosti, P.C.
9302 Lee Highway, Suite 302
Fairfax, Virginia 22031
(w/o enclosures)